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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 250

MRS. MAROWIGNE EDNA McCONNELL SAVOIE,
ADMINISTRATRIX OF THE ESTATE OF
HORACE P. GUIDRY,

Petitioner,

versus

THE TEXAS COMPANY,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

CLAY, COLEMAN,
DUTREY & THOMSON,
ELWOOD R. CLAY,
JAMES JULIAN COLEMAN,
LOUIS J. DUTREY,
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STATUTE CITED

Act of March 4, 1915, c. 153, Sec. 20, 38 Stat. 1185; as amended June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007; 46 U.S.C. 688, Jones Act 2, 14

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PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays for a rehearing of the order of this Honorable Court dated October 14, 1957, denying her petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

BASIC FACTS.

This was an action brought by the administratrix of the late Horace P. Guidry's estate to recover damages for his death alleged to have been caused by the negligence of his employer, The Texas Company. The suit was brought under the Jones Act. A jury heard the case and awarded plaintiff damages in the amount of $80,000.00. The judgment was later remitted to $40,000.00. On appeal to the Fifth Circuit Court of Appeals the judgment was reversed on the ground that there was not sufficient evidence to support the finding by the jury that the decedent was a seaman.

ARGUMENT.

I.

A Fact is Not "Undisputed" if the Evidence is Contradictory on the Point in Question and There Has Not Been a Stipulation of Fact, and Where An Appellate Court Overturns a Jury Determination of Fact Upon the False Premise That Certain Material Facts Were "Undisputed", Such Decision Must Be Reversed as Being in Contravention of the Seventh Amendment.

The essence of the Fifth Circuit opinion is contained in the last paragraph thereof and clearly reveals that that Court regarded as "undisputed" a number of facts which are important to the question of whether the decedent in this case was a seaman. The paragraph reads as follows:

> "From the **UNDISPUTED FACTS** in this case, the decedent was employed as a roustabout by appellant. He was employed to work on the platforms,

not on the vessel. There is no substantial evidence to support the jury's finding that he was a member of the crew. He was an oil-field worker strictly, and not a boat crewman. His duties did not pertain to navigation, not even to the casual task of throwing a rope or making the boat fast, a service that readily could be performed by a harbor worker. He had no such duties to perform. He was merely a passenger on the Mary Virginia, and he was not on the boat when he met his death." (Emphasis added).

Texas Company v. Savoié, 240 F. (2d) 674, reh. den. 242 F. 2d 667 (1957).

We agree with the conclusion of the Fifth Circuit that if the above were the undisputed facts of this case there may be some basis for holding that the man was not a seaman. But it is not according to principle to state an opinion that facts are "undisputed" when in truth and in fact these very facts were the most hotly contested part of the case and were held by the jury to be exactly opposite from facts that the appellate court holds as "undisputed". The jury disputed the facts that the Fifth Circuit holds in their opinion as "undisputed" because the jury answered specific questions submitted by the judge as to the facts.

The testimony of the witnesses, the argument of counsel, the instructions of the trial court, the findings of the jury, the rulings of the trial court on various motions, all show that the above facts are very much disputed.

There was no stipulation of facts between counsel in this case. If by the use of the word "undisputed" the appellate court meant to convey such a stipulation, this is completely erroneous. This part of the opinion was not pointed out to this Court in the original application for writs as the full import of the finding of "undisputed" facts was not revealed until the questioning of counsel in regard to this decision.

One of The Texas Company's employees testified that the decedent was employed as a roustabout. The evidence presented by the plaintiff against this claim was that, (1) the decedent employed the men who were in charge of the boat, (2) the decedent had complete charge of the navigation of the boat, (3) the decedent spent a great portion of his time aboard the boat, (4) it was impossible for the boat to be navigated, brought up to 20 or 30 different wells a day, tied up, untied with only one man aboard and that it was the decedent's duty to fulfill the responsibility of a seaman aboard the boat over which he had complete charge as a result of the hiring of men on the boat. The question the jury had to determine was whether they would believe The Texas Company's evidence that the man was just a roustabout, or plaintiff's evidence that the man was a seaman in charge of the boat, in charge of navigation and performing the necessary duties required for a two man crew aboard a 44-foot lugger. The Fifth Circuit Court may honestly have believed The Texas Company's witnesses. The twelve jurors honestly believed the evidence of the plaintiff. The only place where the word "undisputed" can be used is that undoubtedly the Fifth Circuit believed the facts as presented by The Texas Company to be undisputed and not

have given any weight to the facts that were found by the jury from the evidence that was presented to them.

So much for the undisputed fact as to the employment of decedent as a roustabout against plaintiff's contention that decedent was employed to take charge of the Mary Virginia as a seaman to perform seaman's services while aboard the Mary Virginia and that this was what he actually did during the period of his employment. The crowning proof that The Texas Company's testimony as to the employment of decedent as a roustabout was subject to clear question is that not one witness who testified was with the company when the decedent was employed, as the decedent had sixteen years of service, which was longer than any of those who testified for the defendant.

The second undisputed fact that the Fifth Circuit Court found was that decedent "was employed to work on the platforms and not on the vessel". The Texas Company's witness testified to this fact. The evidence presented by the plaintiff was directly contradictory and opposed to The Texas Company's witness's testimony. It was admitted that it took at least a two man crew to operate the 44-foot lugger Mary Virginia. The jury found as a fact that the decedent had to be serving as a boat crewman on the Mary Virginia because they believed the defendant's own witness as to this fact. There was nothing disputed about the fact that it took two men to operate the Mary Virginia in its daily cruise to 30-odd different oil wells, yet the Fifth Circuit found that it was undisputed that the decedent was not a crewman.

The following are additional "undisputed" facts found by the Fifth Circuit opinion: (3) decedent was "an

oil-field worker strictly", (4) decedent was "not a boat crewman", (5) decedent's "duties did not pertain to navigation", (6) decedent's duties pertained "not even to the casual task of throwing a rope", (7) decedent's duties pertained not even to "making the boat fast", (8) the above (6) and (7) duties "could be performed by a harbor worker". (Note: We would be derelict if we did not point out that the jury certainly found docking, tying up and holding alongside the 44-foot lugger Mary Virginia out in the middle of a large body of water was certainly a completely different duty from a harbor worker who stands on shore to tie up a vessel. The decedent's duty aboard the Mary Virginia forced him to be both aboard the lugger during the tie up period if the other crewman jumped off and stood on the platform or *vice versa*, it being the clear testimony that many times the lugger pulled alongside only momentarily while one of the men jumped off to examine a chart and then returned aboard the lugger. WE CAN NOT IMPRESS THE COURT TOO STRONGLY WITH THE JURY'S FINDING OF FACT THAT IT TOOK TWO MEN, THE DECEDENT AND THE OTHER MAN ABOARD, TO OPERATE, NAVIGATE AND HANDLE THE LARGE 44-FOOT LUGGER MARY VIRGINIA. Great stress undoubtedly was put on this undisputed fact wherein the jury had to come to the conclusion that the decedent was a seaman, yet not once has the Circuit Court even so much as mentioned this undisputed fact. Not only is the fact admitted in evidence by expert witnesses of The Texas Company who honestly admitted to this fact, but there is documentary evidence in the charter party which clearly shows that there was need for two men aboard the 44-foot lugger by the very

terms of the charter. The jury was composed of men who know this area and undoubtedly were familiar with boats, so there was no question in their minds on hearing a description of the duties of the Mary Virginia of the importance of this undisputed fact in reaching their conclusion). (9) decedent had no such duties to perform, *i. e.*, as a crewman, (10) decedent was merely a passenger on the Mary Virginia and (11) decedent was not on the boat when he met his death. We must honestly admit that the last fact found by the Fifth Circuit as an undisputed fact is the one and only undisputed fact that both plaintiff and defendant testimony was in complete agreement.

The chief basis for petitioner's request in this portion of the rehearing motion is based solely on the fact that if the appellate court has a right to find "undisputed facts" from a record full of highly controversial facts, the right of trial by jury protected by the United States Constitution in the Seventh Amendment is of no practical use. It is respectfully urged to the Court that a review of the record will reveal that the constitutional right granted to the petitioner for a trial by jury has been completely withdrawn through the use of finding "undisputed facts" when such undisputation does not exist.

A decision reversing a jury and which purports to rest upon "undisputed facts" cannot be permitted to stand when it is shown that the facts are very much in dispute. This would constitute a reexamination of facts not in accordance with the Seventh Amendment to the Constitution. A labeling of facts as "undisputed", when they are disputed and contradicted by the evidence, deprives petitioner of her right to trial by jury, because if it is as-

sumed, as petitioner contends, that such facts were in dispute, then the basis for the Fifth Circuit Court decision falls. This Honorable Court should grant certiorari to determine, at the very least, whether petitioner's contention is valid, *i. e.*, that the facts recited in the opinion of the Fifth Circuit were not undisputed and find contradiction in the evidence, in the rulings of the lower court, in the findings of the jury and even in certain respects, in the argument of respondent's counsel before the jury.

> "The very essence of (the jury's) function is to select from among conflicting inferences and conclusions that which it considers most reasonable."
>
> *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520.

II.

The Court of Appeals for the Fifth Circuit Was Without Jurisdiction to Hear Respondent's Appeal Since Respondent Attempted to Appeal From an Order Granting a New Trial Conditioned Upon a Remittitur, and Such an Appeal, Not Being From a Judgment, Did Not Confer Jurisdiction Upon the Appellate Court.

Respondent, according to its notice of appeal, took an appeal from "the judgment entered in this action on the 11th day of May, 1956. . . ." (R. 232). The record discloses an entry on May 10, 1956 of an order granting a new trial. (R. 231). The verdict of the jury, which was made the judgment of the District Court as remitted, was entered on March 20, 1956, (R. 203), about seven weeks prior to the date specified in respondent's appeal. There is no "judgment of May 11, 1956" in this proceeding.

It is well settled in federal practice that no appeal lies from an order granting or denying a new trial. *Fairmount Glass Works v. Coal Co.*, 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439 (1933); *Baltimore & O. Terminal R. Co.*, 142 F. (2d) 779 (CCA 7th 1944), *cert. den.* 323 U. S. 775, 65 S. Ct. 135. In the event an appeal is taken from an order granting a new trial, the appellate court is without jurisdiction to hear the appeal, and the appeal should be dismissed forthwith. *Baltimore & O. Terminal R. Co., supra.* There are no circumstances present in this case to excuse the action of respondent in appealing from an order granting a new trial rather than a judgment and, accordingly, the Court of Appeals for the Fifth Circuit was in error in not having dismissed the appeal.

III.

A Federal Appellate Court Does Not Normally Review the Verdict of a Jury But Only the Acts of the Judge, and a Mere Reexamination of the Facts Without a Finding of Error on the Part of the Judge Does Not Authorize a Reversal of a Jury Verdict.

The Fifth Circuit directly reviewed the facts of the instant case. After its independent probe of the evidence it substituted its appreciation of the evidence for the findings of the jury. On the other hand the Fifth Circuit, in its opinion, specifies no error, nor an abuse of discretion, on the part of the trial judge. The lower court had examined the sufficiency of the facts upon three occasions, *i. e.*, when he denied respondent's motion for directed verdict, when he denied respondent's motion for judgment *n.o.v.*, and when he granted a partial new trial on the sole issue of damages.

In 1946 the Fifth Circuit Court of Appeals stated in *Home Ins. Co. v. Tydal Co.*, 152 F. 2d 309 (CCA 5th 1946) as follows:

> "In the federal system appellate courts do not normally review the verdict of the jury, but only the acts of the judge. The trial judge alone has the right and duty to set the verdict aside if dissatisfied with it. The most an appellate court can do, if it thinks the verdict not according to the weight of the evidence, is to scan the trial more closely for error. We are not impressed that this verdict is wrong."

It is submitted that the Fifth Circuit was without authority to reexamine the facts absent a finding of error in the acts of the trial judge.

The Fifth Circuit exceeded the scope of permissible review when it probed directly into the facts and testimony of this case without deciding upon the correctness of the acts of the trial judge who upon three occasions had ruled that the evidence did support the jury finding that decedent was a seaman.

IV.

Determination by Juries of the Status of Thousands of Persons Employed in Maritime Jobs in Gulf Waters Will Be Adversely Affected if the Decision of the Fifth Circuit is Allowed to Stand.

The states comprising the Fifth Circuit, namely, Texas, Louisiana, Mississippi, Alabama, Georgia and Florida, front on the Gulf of Mexico, with the exception of

Georgia, and all have a vital interest in the orderly judicial process by which the rights of maritime employees will be determined.

The Fifth Circuit Court of Appeals reversed a finding by the jury that a barge worker was a seaman under the Jones Act in the case of *The Texas Company v. Martin*, 222 F. 2d 382, 350 U. S. 879, 76 S. Ct. 141; *reh. den.* 76 S. Ct. 346. In a *per curiam* by the Supreme Court, the action of the Fifth Circuit was reversed and the judgment of the lower court was reinstated.

Following on the heels of *Martin*, the instant decision will considerably weaken the effectiveness of jury findings on the question of seaman status in that large group of persons in borderline situations who quite clearly have maritime employment, but who do not fit into the classic definition of seamen. This Court should take certiorari in the instant case in order that a clarifying pronouncement on the status of these maritime workers can be rendered and particularly that the conflict between *Martin* and the instant case be resolved. The Gulf waters are particularly affected by this problem due to the tremendous growth of industrial activity in coastal waters and just inside the coastline.

As Mr. Justice Black said in *Schulz v. Pa. R. R. Co.*, 76 S. Ct. 608, 350 U. S. 523 (1956), the jury trial is part and parcel of the remedy afforded seamen under the Jones Act. This Honorable Court must ever be alert to prevent "judicial erosion" of the guarantee of jury trial under the Seventh Amendment and that need is particularly felt in the Fifth Circuit where so many maritime employees are affected.

V.

Under Common Law Procedure if Facts Are Reexamined by an Appellate Court and Are Found to Have Been Determined Erroneously by a Jury, the Appellate Court May Not Order a Reversal of the Judgment But Can Only Remand the Case for a New Trial.

The Fifth Circuit reexamined the facts of the instant case and, based upon its own finding of fact, ordered a reversal of the judgment entered upon the jury's verdict. Such action finds no precedent in common law procedure and therefore violates the Seventh Amendment to the Constitution of the United States. The Seventh Amendment secures the individual litigant from an appellate court's reexamination of jury facts other than in accordance with common law procedure.

Under the common law when an appellate court sets aside a jury verdict for an error in fact the suitor is not thereby deprived of his right of trial by jury, which is retained, but the suitor may be ordered to submit to a new trial of the cause before a new venire. In 1912 this Honorable Court ruled upon the point under discussion in the following words, taken from *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 377, 33 S. Ct. 523, 57 L. Ed. 879 (1912):

> "'. . . Now, according to the rules of the common law the facts once tried by a jury are never reexamined, unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tri-

bunal, on a writ of error, and a *venire facias de novo* is awarded. This is the invariable usage settled by the decisions of ages'."

"In *Parsons v. Bedford*, 3 Pet. 433, decided in 1830, the same learned justice, speaking for this court, said (p. 446): 'The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. . . . One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress, and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people.' And then coming to the clause, 'and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law,' he continued (pp. 447, 448): 'This is a prohibition to the courts of the United States to reexamine any facts tried by a jury in any other manner. The only modes known to the common law to reexamine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings.' . . ."

The Fifth Circuit trespassed upon the constitutional rights of petitioner when it presumed to reverse the judgment on the evidence without benefit of a new trial. *Slocum* has not been overruled but, in fact, has been reaffirmed in *Aetna Ins. Co. v. Kennedy*, 301 U. S. 389, 57 S. Ct. 809, 81 L. Ed. 1177 (1936). Congress, in fashioning the Jones Act, intended that the issues comprehended by an action thereunder should be decided by a jury if requested. Petitioner has demanded her right of trial by jury throughout this action and has never waived same. It is unconstitutional for her to be deprived of a new trial before a jury as to any issue upon which the appellate court has set aside the judgment for error in fact.

CONCLUSION.

For the foregoing reasons, petitioner respectfully prays that the order of this Court denying her petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit be reheard and vacated and that the said petition for certiorari be granted.

Respectfully submitted,

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LOUIS J. DUTREY,
JACK W. THOMSON, JR.,
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1649 National Bank of Commerce Bldg.,
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New Orleans, Louisiana,
November ....., 1957.

CERTIFICATE OF COUNSEL.

The undersigned, Jack W. Thomson, Jr., attorney for petitioner, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, and that in his judgment said petition is restricted to the grounds specified in Paragraph 2 of Rule 58 of the Supreme Court Rules, and that foregoing petition for rehearing is not presented for delay.

JACK W. THOMSON, JR.

CERTIFICATE OF SERVICE.

I, the undersigned counsel, do hereby certify that a copy of the foregoing petition for rehearing has been served upon Messrs. John May and Ernest A. Carrere, Jr., counsel of record for respondent, and Mr. D. Douglas Howard, of counsel for respondent, by transmission through the U. S. Mails, properly addressed and stamped, this
day of November, 1957.